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7 **UNITED STATES DISTRICT COURT**
8
DISTRICT OF NEVADA
9

10 UNITED STATES OF AMERICA,
11 Respondent/Plaintiff,
12 v.
13 TERRANCE MCNICHOLS,
14 Petitioner/Defendant.

Case No. 2:07-CR-130-RCJ-PAL

**JOINT MOTION TO CORRECT
SENTENCE UNDER 28 U.S.C. § 2255**

16 Petitioner/Defendant, Terrance McNichols, by and through his counsel of record,
17 Rene L. Valladares, Federal Public Defender, and Nisha Brooks-Whittington, Assistant Federal
18 Public Defender, and the United States, by and through counsel of record, Daniel G. Bogden,
19 United States Attorney, and Elizabeth O. White, Appellate Chief and Assistant United States
20 Attorney, respectfully move this Court to vacate and correct Mr. McNichols's sentence under
21 28 U.S.C. § 2255. The parties jointly recommend this Court resentence Mr. McNichols to 120
22 months' imprisonment, to be followed by three years of supervised release.

23 **I. INTRODUCTION**

24 On February 11, 2008, Terrance McNichols ("Mr. McNichols") pled guilty to one count
25 of felon in possession of a firearm pursuant to 18 U.S.C. §§ 922(g)(1) and 924(a)(2). ECF
26 No. 36. At sentencing, the Court found that Mr. McNichols qualified as an Armed Career

1 Criminal under 18 U.S.C. § 924(e)(2)(B) (“ACCA”), and sentenced him to 192 months’
 2 imprisonment. ECF No. 38. In doing so, the Court relied on, among other things, two prior
 3 offenses (battery constituting domestic violence) that were “violent felonies” only by virtue of
 4 the ACCA’s residual clause. *See* Presentence Investigation Report (“PSR”) ¶¶ 42, 45.
 5 Mr. McNichols did not appeal.

6 In June 2015, the Supreme Court issued its decision in *Johnson v. United States*, 135 S.
 7 Ct. 2251 (2015). *Johnson* held that the residual clause of the ACCA’s “violent felony”
 8 definition is void for vagueness. *Id.* The Supreme Court subsequently held that *Johnson*
 9 announced a new substantive rule that has retroactive effect in cases on collateral review. *See*
 10 *Welch v. United States*, 136 S. Ct. 1257 (2016).

11 On June 21, 2016, Mr. McNichols filed a Motion to Vacate, Set Aside, or Correct
 12 Criminal Convictions and Sentence Pursuant to 28 U.S.C. § 2255 (“Motion to Vacate”) seeking
 13 sentencing relief under *Johnson*, 136 S. Ct. 1257. ECF No. 54. On August 16, 2016, this Court
 14 ordered the government to file a response on or before August 29, 2016, and Mr. McNichols to
 15 file a reply on or before September 9, 2016. ECF No. 55. This Court also scheduled the
 16 matter for oral argument for September 19, 2016, at 10:30 a.m. in Reno, Nevada. *Id.* On
 17 August 26, 2016, the government filed its response to the Motion to Vacate. ECF No. 56. The
 18 government conceded that in light of *Johnson*, Mr. McNichols no longer qualifies as an Armed
 19 Career Criminal and that Mr. McNichols should be resentenced without application of the
 20 ACCA. *Id.* at 2. As a result of the government’s concession, Mr. McNichols files the instant
 21 Joint Motion in lieu of a reply.

22 The parties agree that *Johnson* and *Welch*’s holdings regarding the ACCA’s residual
 23 clause is retroactive to ACCA cases on collateral review, and further agree that, as a result of
 24 *Johnson*, Mr. McNichols’s battery constituting domestic violence convictions cannot qualify as
 25 predicate ACCA offenses. Thus, the parties agree that Mr. McNichols is “actually innocent”
 26 of being an Armed Career Criminal as defined in 18 U.S.C. § 924(e), and his sentence of

1 192-months is—in light of *Johnson*—a *per se* illegal sentence because it exceeds the 10-year
 2 statutory maximum penalty that applies to his offense of conviction in the absence of an ACCA
 3 sentence enhancement.

4 In light of *Johnson*, Mr. McNichols’s sentence is “in excess of the maximum authorized
 5 by law,” and he is entitled to relief under 28 U.S.C. § 2255. Specifically, he is entitled to
 6 resentencing without application of the ACCA. Although the parties initially disagreed about
 7 the requested sentence,¹ the parties now agree to respectfully requests this Court grant this Joint
 8 Motion, vacate Mr. McNichols’s sentence, and resentence him to 10-years imprisonment, the
 9 statutory maximum sentence for the offense of conviction.

10 II. STATEMENT OF FACTS

11 In February 2008, Mr. McNichols was convicted, on his guilty plea, of felon in
 12 possession of a firearm in violation of 18 U.S.C. § 922(g). ECF No. 38. That offense normally
 13 carries a maximum term of ten years. *See* 18 U.S.C. § 922(g); 18 U.S.C. § 924(a)(2). The
 14 ACCA, however, mandates a 15-year minimum sentence and a maximum term of life in prison
 15 for a felon who has “three previous convictions . . . for a violent felony or a serious drug
 16 offense.” 18 U.S.C. § 924(e)(1).

17 The Pre-sentence Investigation Report (“PSR”) found that Mr. McNichols had four
 18 qualifying prior convictions that triggered the ACCA enhancement: two Nevada felony
 19 convictions for battery constituting domestic violence (*see* PSR ¶¶ 42, 45); and two California
 20 felony convictions for assault with a deadly weapon (*see* PSR ¶¶ 43, 50). At sentencing, the
 21 Court found that Mr. McNichols qualified as an Armed Career Criminal under 18 U.S.C. §
 22 924(e)(2)(B), and sentenced him to 192 months’ imprisonment, to be followed by five years of
 23 supervised release. ECF No. 38. Without the ACCA enhancement, the statutory maximum for
 24

25 ¹ While the parties agree that without application of the ACCA, the applicable guideline
 26 range is 92-115 months, ECF Nos. 54 at 3, 56 at 3, 11, 12, Mr. McNichols’s Motion to Vacate
 requested a sentence of 100 months, ECF No. 54 at 15 and the government’s response requested
 a sentence of 120 months, the statutory maximum sentence for the offense of conviction, ECF
 No. 56 at 12.

1 Mr. McNichols's offense was 10 years under 18 U.S.C. § 924(a)(2). Mr. McNichols has been
 2 in federal custody since July 3, 2007. *See* PSR at p. 1.

3 **III. THE JOHNSON DECISION IS RETROACTIVE TO ACCA CASES ON
 4 COLLATERAL REVIEW**

5 When the Supreme Court announces a new rule, "a person whose conviction is already
 6 final may not benefit from the decision in a habeas or similar proceeding," *Chaidez v. United*
 7 *States*, 133 S. Ct. 1103, 1107 (2013), with two exceptions. As relevant here, "[n]ew substantive
 8 rules generally apply retroactively" on collateral review, including "decisions that narrow the
 9 scope of a criminal statute by interpreting its terms" and "constitutional determinations that
 10 place particular conduct or persons covered by the statute beyond the State's power to punish."
 11 *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004). In *Welch*, the Supreme Court held that the
 12 rule announced in *Johnson* is a new substantive rule that is retroactive to cases on collateral
 13 review. 136 S. Ct. at 1268.

14 **IV. IN LIGHT OF JOHNSON, MR. MCNICHOLS DOES NOT HAVE THREE
 15 PREDICATE VIOLENT FELONIES UNDER THE ACCA**

16 As explained above, this Court based its determination that Mr. McNichols was an
 17 Armed Career Criminal on his four prior felony convictions, two of which qualified as violent
 18 felonies only under the residual clause. Because the residual clause is now void,
 19 Mr. McNichols's prior battery constituting domestic violence convictions do not qualify as
 20 ACCA predicates and he does not have the requisite three predicate convictions to qualify as
 21 an Armed Career Criminal under 18 U.S.C. § 924(e).

22 A sentence that exceeds the statutory maximum, as here, is *per se* illegal and must be
 23 corrected on collateral review. *See* 28 U.S.C. § 2255(a) (authorizing collateral relief for a
 24 sentence "in excess of the maximum authorized by law"); *United States v. Newbold*, 791 F.3d
 25 455 (4th Cir. 2015) (granting § 2255 relief where an erroneous ACCA sentence exceeded the
 26 non-ACCA statutory maximum). Further, an ACCA sentence based on the residual clause

1 violates the Constitution's Due Process Clause. *See* § 2255(a) (authorizing collateral relief for
2 a sentence "imposed in violation of the Constitution or laws of the United States); *Johnson*, 135
3 S. Ct. at 2563.

4 **V. CONCLUSION**

5 For the foregoing reasons, the parties respectfully request that this Court grant the
6 instant Joint Motion, vacate Mr. McNichols's sentence, and sentence him to 120-months
7 imprisonment to be followed by three years of supervised release. Should this Court grant the
8 instant Joint Motion, Mr. McNichols further requests this Court to vacate the currently
9 scheduled Oral Argument that is set for 10:30 a.m. on September 19, 2016, in Reno, Nevada.²

10 Dated this 7th day of September, 2016.

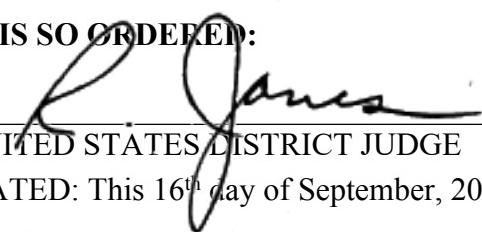
11 Respectfully submitted,

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21 IT IS SO ORDERED:
22 
23 UNITED STATES DISTRICT JUDGE
24 DATED: This 16th day of September, 2016.

26 ² Undersigned counsel, Nisha Brooks-Whittington discussed this case with
Mr. McNichols and he agrees with the representations herein and further waives his right to be
present at any resentencing hearing, *see* Fed. R. Crim. P. 43(b)(3).